

## **AGRICULTURAL LABOR RELATIONS BOARD**

### **FINAL TEXT OF PROPOSED AMENDMENTS TO TITLE 8, SECTIONS 20299, 20363, and 20407**

**March 2007**

#### **§20299. Agricultural Employee Relief Fund**

(a) This subsection shall apply to all cases in which the Board has ordered monetary relief for agricultural employees or has issued an order approving a settlement agreement providing for payment of monies to agricultural employees, where the collection of monies pursuant to such orders or settlement agreements occurred on or after January 1, 2002. In addition, this subsection shall apply where the collection of monies occurred prior to January 1, 2002 if the monies were not subject to an enforceable promise to return them to the employer and had not escheated to the State by operation of law as of January 1, 2002.

(1) Where, despite diligent efforts, the Board has been unable to locate employees or any person(s) legally entitled to collect money on their behalf for a period of two years after the date the Board collected monies on behalf of such employees, those monies shall be deposited in a special fund in the State Treasury that shall be named the Agricultural Employee Relief Fund (Fund).

(2) Provisions requiring that monies collected on behalf of employees who are not located within two years after the date of collection be deposited in the Fund may be included, pursuant to the mutual agreement of the Regional Director and the employer, in informal settlement agreements reached in accordance with section 20298.

(b) When a regional director has good cause to believe that the collection of the full amount of monetary relief previously ordered by the Board is not possible after reasonable efforts have been made to collect the balance from the employer, the regional director shall file a motion seeking a finding by the Board that the case is eligible for pay out from the Fund. In the case of formal settlement agreements, as defined in section 20298, where there has been a prior adjudication by the Board of the amounts owing, such adjudication shall define the full amount of monetary relief owing to employees. Where there has not been a prior adjudication of the amount owing to employees, the full amount owing to employees shall be the amount specified in the formal settlement agreement. The motion shall be filed with the Board and served on the parties to the case in accordance with sections 20160 and 20166, and shall be accompanied by a

statement describing the collection efforts made to date and the basis for the regional director's belief that collection of the full amount owing is not possible. Any party to the case may file a response within ten (10) days of service of the motion. If the Board grants the motion, the case shall become eligible for pay out from the Fund, in accordance with the provisions below.

(1) Within ninety days after the end of each fiscal year, the Board shall determine the amounts to be paid to eligible employees and shall begin distribution of those amounts.

(2) Employees eligible for pay out from the Fund shall be those entitled to monetary relief pursuant to orders in cases in which the Board has made the Fund eligibility finding specified in subsection (b) above. Such employees shall be included in the next annual determination referred to in subsection (b)(1). Eligibility shall continue for two successive annual determinations. Thereafter, eligibility for pay out from the Fund shall expire. In no event shall an employee be paid an amount from the Fund exceeding the amount owed but not collected from his or her employer.

(3) The amount to be distributed to each employee eligible for pay out shall be calculated as follows. The total amount of unallocated money in the Fund shall be divided by the aggregated total of the amounts owing to eligible employees. The resulting ratio shall be multiplied by the amount owing to each eligible employee to determine the amount to be distributed to each eligible employee. However, if the ratio is greater than one, it shall be deemed to be one for the purpose of calculating the amounts to be distributed and any monies in excess of the amounts necessary for distribution shall remain in the Fund for future distributions. For the purpose of the above calculation, the "amount owing to each eligible employee" shall not include any amounts allocated to the employee in previous fiscal years.

(4) Notwithstanding subsection (3) above, no amount less than ten dollars shall be allocated or distributed to any employee.

(5) Where money from the Fund cannot be distributed because the employee to whom it is assigned cannot be located and/or does not claim the money, the money shall be held in the Fund for distribution to that employee until one year has elapsed from the expiration of eligibility for distribution from the Fund, at which time the claim shall be extinguished and the money shall revert to the Fund for use in making payments to other eligible employees. Eligibility for distribution shall be deemed to have expired after all allocations for which an employee is eligible or upon an employee being allocated 100% of the amount owed, whichever comes first. However, where a claimant can demonstrate that

extraordinary circumstances prevented distribution or receipt of monies owing prior to the time that the claim was extinguished, the Board may approve payment of the claim.

(c) The provisions of subsection (b) shall be applied to every distribution from the Fund, unless the Board, within ten (10) days of the determination referred to in subsection (b)(1), finds that application of those provisions will result in manifest injustice. In the event of such a finding, the Board may alter the distribution in order to avoid such injustice.

(d) A motion to make a case eligible for pay out from the Fund pursuant to subsection (b) of this section shall be deemed to include a simultaneous motion to close pursuant to *John V. Borchard, et al.* (2001) 27 ALRB No. 1. In such event, the filing requirements set forth in this section shall be controlling. In the event that a closed case is later reopened pursuant to the criteria set forth in *John V. Borchard, et al.* (2001) 27 ALRB No. 1 and further collection of monies from the employer is effectuated, the Fund shall be reimbursed to the extent that the combination of the amount collected from the employer and the amount paid from the Fund exceeds the full amount owed to employees in that case.

Authority: Section 1144, Labor Code

Reference: Section 1161, Labor Code

### **§20363. Post-Election Determination of Challenges.**

(a) If the tally of ballots discloses that the challenged ballots are sufficient in number to affect the outcome of the election, the regional director shall conduct such investigation as he or she deems necessary to determine the eligibility of the challenged voters, including giving all parties an opportunity to present evidence on each of the challenges. The time period for submitting evidence shall be at the discretion of the regional director, but in no case shall be less than seven (7) days. The parties shall provide the regional director with two copies of any evidence submitted. Thereafter, the regional director shall issue to the Board a report containing his or her conclusions and recommendations and a detailed summary of the facts underlying them. A copy of the regional director's report shall be served on all parties. Where, after investigation, the regional director deems it appropriate, he or she may issue a notice of hearing on those challenged ballots which cannot be resolved by investigation and may submit his or her report to the Board containing the conclusions and recommendations and summary of supporting facts on all other challenges. A copy of the notice of hearing shall be served on all parties. Such hearing will be in accord with section 20370.

(b) The conclusions and recommendations of the regional director, set forth in the report provided for in (a) above, shall be final unless exceptions to the conclusions and recommendations are filed with the executive secretary by personal service within five days or by deposit in registered mail postmarked within five days following service upon the parties of the regional director's report. An original and six copies of the exceptions shall be filed and shall be accompanied by seven copies of declarations and other documentary evidence offered in support of the exceptions. However, the Board will not consider, absent extraordinary circumstances, evidence that was not submitted timely to the regional director pursuant to subsection (a). "Extraordinary circumstances" includes recognized legal excuses such as where the evidence is newly discovered, and not reasonably discoverable, or the party was not on notice as to issues in dispute. Copies of any exceptions and supporting documents shall be served pursuant to section 20166 on all other parties to the proceeding and on the regional director and proof of service shall be filed with the executive secretary along with the exceptions. Upon the filing of exceptions, the regional director shall forward to the Board the entire record relied upon in the investigation.

(c) In serving exceptions and supporting documents on other parties pursuant to subdivision (b) above, the excepting party shall have the option of serving a detailed statement of facts in lieu of the declarations. This detailed statement of facts shall describe the contents of declarations in sufficient detail to allow an opposing party to secure its own witnesses and otherwise prepare itself to counter the exceptions at an evidentiary hearing. An excepting party electing to serve a detailed statement of facts on other parties shall also file the original and six copies of this statement with the executive secretary together with the declarations.

(d) In any case in which exceptions are filed to a regional director's recommendations for the disposition of challenged ballots pursuant to subsection (b) above, the record on review by the Board shall consist of: the petition pursuant to Labor Code Section 1156.3(a), the notice and direction of election, the tally of ballots, the evidence submitted to the regional director by the parties, as well as any other evidence relied on by the regional director, the regional director's report on challenged ballots, and the exceptions thereto, along with supporting evidence and briefs as provided in subsection (b) above.

Authority: Section 1144, Labor Code

Reference: Section 1157, Labor Code

## **§20407. The Mediation and Conciliation Process**

(a) Mediation shall proceed in accordance with Labor Code section 1164, subdivisions (b), (c), and (d). The 30-day periods referred to in Labor Code section 1164, subdivision (c) shall commence on the date of the first scheduled mediation session, shall proceed for consecutive calendar days, and shall not include any pre-mediation conference. The 30-day timelines may be waived by mutual agreement of the parties and with the approval of the mediator. Pre-mediation conferences may be scheduled at the discretion of the mediator.

(1) No later than seven (7) days after receipt of a Board order directing the parties to mandatory mediation and conciliation, and prior to their first discovery requests pursuant to section 20406 above, each party shall identify for the mediator those issues that are in dispute and those that are not in dispute, identify the standards which they propose to resolve the disputed issues, and provide agreed upon contract language for those issues not in dispute. This information shall be served on the other party immediately and on the mediator upon his or her selection. During the mediation, the parties shall provide the mediator with a detailed rationale for each of its contract proposals on issues that are in dispute, and shall provide on the record supporting evidence to justify those proposals. The failure of any party to participate or cooperate in the mediation and conciliation process shall not prevent the mediator from filing a report with the Board that resolves all issues and establishes the final terms of a collective bargaining agreement, based on the presentation of the other party.

(2) The mediator shall preside at the mediation, shall rule on the admission and exclusion of evidence and on questions of procedure and shall exercise all powers relating to the conduct of the mediation. All evidence upon which the mediator relies in writing the report required by section 1164, subdivision (d) shall be preserved in an official record through the use of a court reporting service or, with the consent of both parties and the approval of the mediator, by a stipulated record. The mediator shall cite evidence in the record that supports his or her findings and conclusions. The mediator shall retain the discretion to go off the record at any time to clarify or resolve issues informally. All communications taking place off the record shall be subject to the limitations on admissibility and disclosure provided by Evidence Code section 1119, subdivisions (a) and (c), and shall not be the basis for any findings and conclusions in the mediator's report.

(3) The parties shall have the right to be represented by counsel or other representative.

(4) The parties to the mediation are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing, but rules of evidence and rules of judicial procedure need not be observed. The testimony of witnesses shall be given under oath.

(b) In determining the issues in dispute, the mediator may consider those factors commonly applied in similar proceedings, such as, but not limited to:

(1) The stipulations of the parties.

(2) The financial condition of the employer and its ability to meet the costs of the contract in those instances where the employer makes a plea of inability to meet the union's wage and benefit demands.

(3) Comparison of corresponding wages, benefits, and terms and conditions of employment in collective bargaining agreements covering similar agricultural operations with similar labor requirements.

(4) Comparison of corresponding wages, benefits, and terms and conditions of employment in comparable firms or industries in geographical areas with similar economic conditions, considering the size of the employer, the skills, experience, and training required of the employees, as well as the difficulty and nature of the work.

(5) The average consumer prices for goods and services, commonly known as the Consumer Price Index, and the overall cost of living in the area where the work is performed.

(c) The mediator shall issue his or her report within twenty-one (21) days of the last mediation session. Upon completion of the mediator's report, the report shall be served on the parties and filed with the Board in accordance with sections 20164 and 20168. Upon the filing of the report, the mediator also shall transfer the official record of the proceeding to the Board.

(d) The issuance of any document signed by the mediator which reflects the determination of the issues in dispute and fixes the terms of a collective bargaining agreement shall be deemed a "report" pursuant to Labor Code sections 1164 through 1164.13, and these regulations.

(e) Where the parties agree to a collective bargaining agreement without the issuance of a mediator's report, as defined in subdivision (d), the parties shall notify the Board and submit a copy of the signed agreement pursuant to Regulation 20450.

Authority: Section 1144, Labor Code

Reference: Section 1164, Labor Code